Supreme Court, U.S.
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No. 00-1110

IN THE

Supreme Court of the United States

MAGDY ELAMIR, KENNEDY MRI, INC., IRVINGTON MRI, P.A., PATERSON MRI, P.A., and JERSEY CITY NEUROLOGICAL CENTER, INC.,

Petitioners,

v.

MAGNET RESOURCES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPERIOR COURT OF NEW JERSEY

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Magnet Resources Inc., is a privately held corporation. There is no parent company, nor does any publicly held corporation own 10% or more of the corporation's stock.

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REASONS FOR DENYING THE WRIT

The Petition for Writ of Certiorari should be denied because Petitioners have received procedural due process in compliance with the Fourteenth Amendment to the United States Constitution. Rule 10 of the Rules of the Supreme Court of the United States provides that, "Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." In *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 79, 75 S. Ct. 614 (1955), Justice Frankfurter recited that:

> [I]t is very important that [the Court] be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and of cases in which there is real and embarrassing conflict of opinion . . . [in the lower courts].

(quoting Chief Justice Taft in, *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393, 43 S. Ct. 422 (1923)). This case does not involve issues of such importance, nor are the lower courts in conflict with one another.

The Appellate Division of the Superior Court of New Jersey ("Appellate Division") expressly found due process *had* been given. Indeed, the Court found that Petitioners' due process argument was without merit because the petitioner, Dr. Magdy Elamir, had every fair, effective and reasonable opportunity to be heard on the merits as to the underlying claim when the suit was initially tried and on the motion to reopen and add additional defendants.

(Petitioners' Appendix at 10a ("Pet. App.")). The corporate Petitioners are not separate corporations, but merely alter-egos of one man, and they were afforded every fair opportunity to be heard through Dr. Elamir, their sole owner. The Appellate Division stated that no different due process standard was applied in *Nelson v. Adams USA, Inc.*, 529 U.S. 460 (2000) (Pet. App. at 10a). In *Nelson*, the Supreme Court held that an amendment of judgment violated Rule 15 and due process when imposition of liability for attorney fees against the sole shareholder of a plaintiff corporation occurs simultaneously with the amendment of the defendant's pleadings to add the shareholder as a party. The shareholder was never provided a proper opportunity to respond to the claim against him, but was adjudged liable the very first moment his personal liability was legally at issue.

The due process concerns articulated in *Nelson* are not implicated here. The Appellate Division's ruling was proper in all respects; Petitioners had notice of respondent's claims and their intention to pierce Petitioners' corporate veil, and ample opportunity to be heard, and were, in fact, heard at length. Accordingly, Respondent Magnet Resources, Inc. respectfully urges this Honorable Court to deny the Petition for a Writ of Certiorari.

PRELIMINARY STATEMENT/ STATEMENT OF FACTS

In July 1997, Respondent Magnet Resources, Inc. ("Magnet") obtained a $492,000 judgment against Summit MRI, Inc. ("Summit") for the breach of two service contracts. Shortly thereafter, in supplemental proceedings, Magnet learned that a massive fraud had been committed on the Court by Dr. Magdy Elamir, the president and sole shareholder of Summit and of each petitioner herein.

The intent of this fraud was threefold: (1) to make the Court and Magnet believe that Summit was a functioning entity, when in reality it was defunct; (2) to hide the fact that Elamir and the corporate petitioners, Kennedy MRI, Inc., Jersey City Neurological Center, Inc., and Paterson MRI, P.A. were merely alter egos of Summit and of each other; and (3) to mask the fraudulent transfer of Summit's assets to these other Elamir-controlled entities.

These frauds were material and controlled the result in the litigation because, at trial: (1) Summit prevailed on a counterclaim for damages that allegedly occurred in December 1994, even though, in fact, it had been out of business since 1993; *and* (2) Magnet obtained an empty judgment against a penniless Summit. To accomplish this fraud, false testimony was given throughout the entire litigation: during pretrial depositions, in sworn certifications, in sworn interrogatory responses, and under oath at trial.

Magnet discovered this fraud during the course of supplementary proceedings on its judgment. Magnet learned that Summit had effectively ceased doing business on its own account in 1993, years prior to trial. (Pet. App. at 6a). It was also learned that several of Elamir's other corporate entities, namely Kennedy, Irvington, Paterson and Jersey City had absorbed assets and revenues and, along with Elamir individually, had concealed these facts and acted in other way to derogate the rights of Summit's creditors. (Petitioners' Appendix ("Pet. App.") at 6a.)

On August 5, 1997, Magnet submitted a notice of motion and brief in support of a motion to modify the final judgment and shortly thereafter, defendant Summit submitted a letter brief in opposition. This motion was stayed because the trial

court lacked jurisdiction to hear the matter since the case was on appeal to the Appellate Division on the merits. Later, on October 7, 1997 the Honorable Arthur Minuskin, J.S.C., Law Division, entered an order to show cause *with notice* as to why Magnet should not be permitted to reopen the judgment and amend its complaint to assert claims of fraudulent transfer, common law fraud, alter ego, and successor liability against Elamir and his companies. This was also stayed pending the appeal on the merits.

In January 1998, Magnet again moved before the trial judge, Judge Minuskin, to open the judgment to assert claims against the petitioners for fraudulent transfer, common law fraud, alter ego, successor liability and the like.[1] This motion was adjourned pending further discovery ordered by Judge Minuskin. Elamir, and his accountant, Mohammed Hanafy were deposed on three occasions, the issue was thoroughly briefed and, in May of 1999, Judge Minuskin heard oral argument.

Judge Minuskin then scheduled an evidentiary hearing and ordered "the parties to be present with any witnesses they wish to call upon to establish the facts and circumstances *which may or may not justify the Court in amending the judgment to include various other defendants[.]*" (Respondent's Appendix at 2a ("Resp. App.")). The hearings eventually took place on June 16, 21, 22 and 28, 1999, with numerous witnesses testifying, including Dr. Elamir himself.

1. It should also be noted that this application was made in conjunction with Magnet's contempt proceeding against Summit and Elamir for willfully failing to abide by orders of both Judge Minuskin and the Appellate Division requiring the production of documents relating to the supplemental proceedings. The documents were produced only after Judge Minuskin suggested that Elamir be incarcerated pending compliance with the Courts' Orders.

At the close of the hearing Judge Minuskin issued an oral opinion from the bench, ruling that there was clear and convincing evidence that a fraud had been committed on the Court and upon Magnet, and ordered that Magnet's judgment against Summit also be imposed on the petitioners. (Resp. App. at 4a; Pet. App. at 7a.) This opinion was supplemented by a letter opinion dated July 27, 1999, wherein Judge Minuskin went on to say, "It clearly and convincingly appears that the corporations were used simply as *alter egos* of Dr. Elamir for the purpose of obtaining income for his own benefit and defeating the claims of creditors." (Pet. App. at 20a.) Accordingly, the judgment was reentered, now against Elamir, Irvington, Paterson, Kennedy and Jersey City, as well as Summit. (Pet. App. at 15a-16a.)

Based on the compelling record the Appellate Division of the Superior Court of New Jersey ("Appellate Division") unanimously affirmed Judge Minuskin. (Pet. App. at 12a.) Furthermore, given that petitioners had notice of Magnet's claims and notice of the hearing, and that the petitioners were afforded the opportunity to call any witnesses and to present any evidence they desired, the Appellate Division considered and rightfully concluded that their due process argument "ha[d] no merit." (Pet. App. at 10a.) Supporting the Appellate Division, the Supreme Court of the State of New Jersey denied certification to petitioners. (Pet. App. at 1a.) Thus, three levels of courts of the State of New Jersey have held that Petitioners were afforded procedural due process.

Petitioners now contend that this Court should grant a Writ for Certiorari because, they assert, this case is analogous to *Nelson v. Adams USA, Inc.*, 529 U.S. 460 (2000). The position taken by the New Jersey Courts is quite clear: the defendant/judgment debtors were not separate entities

requiring individualized due process, but a single hydra-headed wrongdoer. The liability of one established the liability of all – the obligation of one was, therefore, the liability of all without the need for further process. *State, Dept. of Environmental Protection v. Ventron Corp.*, 94 N.J. 473, 468 A.2d 150 (1983) ("Imposing personal liability satisfies the purpose of the doctrine of piercing the corporate veil, which is to prevent an independent corporation from being used to defeat the ends of justice, to perpetrate fraud, to accomplish a crime, or otherwise evade the law." *DEP v. Ventron*, 94 N.J. at 500, 468 A.2d 150, 164) (citations omitted).

Review of the record below plainly demonstrates that Judge Minuskin, the Appellate Division, and the Supreme Court of New Jersey all properly decided this case. More than ample notice was present, as was the opportunity to be heard, time and time again.

Moreover, a Court can open a judgment and add additional judgment debtors where, after substantial discovery and an evidentiary hearing, it is abundantly clear that a fraud has been perpetrated. This is especially true where, as here, the additional judgment debtors are, in every meaningful and conceivable way, identical to the original judgment debtor. *In Re Levander*, 180 F.3d 1114 (9th Cir. 1999). As such, the Petition for a Writ of Certiorari should be denied.

PETITIONERS ARE NOT ENTITLED TO CERTIORARI

I.

THIS CASE CAN BE DISTINGUISHED FROM *NELSON*

Petitioners contend this case is analogous to *Nelson v. Adams USA, Inc.*, 529 U.S. 460 (2000), and thus warrants summary reversal. (Petitioner's Brief at 8.) These contentions are without merit. Petitioners have in fact received procedural due process, as required by the Constitution. Accordingly, the petition should be denied.

While the legal issues in *Nelson* appear to be somewhat similar to this case, the facts are not and the factual distinction requires a different result. In *Nelson*, Ohio Cellular Products Corporation ("OCP"), an entity wholly owned by Donald Nelson, sued Adams USA, Inc. claiming patent infringement. *Nelson*, 529 U.S. at 462. The District Court dismissed the plaintiff's suit against the defendant, and ordered OCP to pay costs and attorneys fees. *Id.* at 463. In awarding costs and fees, the District Court determined that Nelson deceitfully withheld information from the U.S. Patent and Trademark Office. *Id.* Fearing that OCP would not be able to satisfy the judgment, Adams then moved for attorney's fees and costs against Nelson personally, and accordingly, sought to amend his pleading by adding him as a party. *Id.* Adams did not prepare an amended pleading, and obviously, none was filed with the Court. *Id.* at 466. Nevertheless, the District Court granted Adams' motion in full. In affirming, the Court of Appeals for the Federal Circuit concluded that Nelson had not been prejudiced by the postjudgment joinder.

Id. at 465. The Supreme Court reversed and ruled that the new defendant's due process rights under the Fourteenth Amendment were violated. *Id.* at 466.

In reaching its decision, the Supreme Court distinguished the *Nelson* case from *Fromson v. Citiplate, Inc.*, 886 F.2d 1300 (Fed. Cir. 1989). In *Fromson*, the sole shareholders of a corporation were added as judgment debtors after falsely assuring the court before trial that the corporation was solvent. *Nelson*, at 468. The Supreme Court concluded in *Fromson* the Federal Circuit properly added the sole shareholders to the judgment because they "acted deliberately to derail" a suit against them in their individual capacities. *Id.* By contrast, the record before the Supreme Court in *Nelson* contained no evidence of a "false assurance regarding [plaintiff's] solvency." *Id.* However, the instant facts unequivocally include demonstrative evidence that Dr. Elamir and his accountant gave false and fraudulent information about the solvency of petitioner Summit and his other entities, thus putting this case on all fours with *Fromson*.

A. Petitioners Had Notice and A Meaningful Opportunity to Be Heard

Procedurally, this case is critically different from *Nelson*. Here, Petitioners had both notice and an opportunity to be heard. First, counsel for Petitioners' appeared before Judge Minuskin with respect to this matter on numerous occasions. Furthermore, Petitioners' vigorously responded to and contested Respondent's various motions to open the judgment *before* the evidentiary hearing was held. Second, Petitioners were served with a pleading in January, 1998 that specifically and in no uncertain terms advised them of Magnet's claims. Specifically, the pleading asserts claims against Dr. Elamir

and the other petitioners for fraudulent transfer, common law fraud, alter ego, and successor liability. Third, before amending the judgment, Judge Minuskin provided written notice scheduling an evidentiary hearing and ordered "the parties to be present with any witnesses they wish to call upon to establish facts and circumstances *which may or may not justify the Court in amending the judgment to include various other defendants [;]*" including Dr. Elamir. (Resp. App. 2a.) (emphasis added). Fourth, from the time of Judge Minuskin's notice, Petitioners had more than a month to prepare for the hearing. Fifth, Petitioners fully participated in the four-day evidentiary hearing, and even called their own witnesses. That fact, taken alone, dispositively distinguishes the cases because in *Nelson* no evidentiary hearing was held.

The procedural due process concerns articulated in *Nelson* are simply not present here. Petitioners received due process, extensive notice and ample opportunity to be heard. Petitioners had Magnet's proposed complaint, naming Elamir and the other petitioners as defendants, for more than one year prior to the June, 1999 hearing. Petitioners also participated in discovery on their liability. Moreover, they had more than one month's notice of the hearing from Judge Minuskin, ample time to marshal their defenses. As such, there can be no debate that petitioners knew exactly what claims were being asserted by Magnet and that the Court was considering adding them as judgment debtors. Most significantly, they had an opportunity to be heard. Petitioners fully participated in the four day evidentiary hearing, they cross-examined Magnet's witnesses, they called their own witnesses, and they introduced evidence in support of their position.

B. This Case is Replete With Examples of Fraud

Unlike *Nelson*, the record here is replete with examples of efforts taken to deceive the Court and Magnet with respect to Summit's solvency. Indeed, the facts here, to a much greater extent than *Fromson*, demonstrate that monumental efforts were undertaken deliberately to derail the truth about Summit MRI. First, there were numerous false assurances to the Court and to Magnet that Summit was making millions of dollars per year, when in fact it was defunct. Second, there were false claims asserted on behalf of Summit to indicate that it was still in business in December, 1994, when in reality it was not. In addition, there was false deposition testimony, false answers to interrogatories, and there was false trial testimony with respect to Summit's solvency and corporate status. This was all done in an effort to perpetrate a fraud on the Court and upon Magnet. Dr. Elamir conducted his business in such a way that all his corporations acted as one entity for his own personal gain. (Pet. App. 8a.)

Furthermore, *Nelson* is silent as to the very recent case of *In Re Levander*, 180 F.3d 1114 (9th Cir. 1999), a case more factually identical to this one. There, the Court added an additional judgment debtor after a final judgment because the original judgment debtor had transferred all of its assets and covered it up with false pretrial deposition testimony. *Id.* at 1117. The Supreme Court in *Nelson* had the perfect opportunity to circumscribe the ability of a Court to add additional judgment debtors in situations similar to this, but it declined to do so by explicitly endorsing *Fromson* and tacitly endorsing *In Re Levander*. Instead, the Court held only that it was improper to adjudge the additional defendant liable "the very first moment his personal liability was legally at issue" without giving him an opportunity to be heard. *Nelson*, 529 U.S. at 470.

C. Unlike Nelson, This Case Is Predicated on Alter-Ego Liability and Piercing the Corporate Veil

This case is distinguishable because in *Nelson* there was no finding that the party added to the judgment was an alter-ego of the party already named. *Nelson*, 529 U.S. at 471 ("Adams, for its part, has disavowed reliance on a veil-piercing theory, . . . The legitimacy of [the judgment debtor] corporation, in short is not at issue in this case."). As set forth both above and at length in Point II, the very reason that petitioners were added as parties/judgment debtors was because, under the "guidance" of their sole proprietor Dr. Elamir, they defrauded the Court and Magnet and completely disregarded the corporate form. The corporate petitioners were a single instrument of Elamir's.

The power of New Jersey Courts to pierce the corporate veil is well established. In *State, Dept. of Environmental Protection v. Ventron Corp.*, 94 N.J. 473, 468 A.2d 150 (1983), the New Jersey Supreme Court stated: "The purpose of the doctrine of piercing the corporate veil is to prevent an independent corporation from being used to defeat the ends of justice, to perpetrate fraud, to accomplish a crime, or otherwise evade the law." *Id.* at 500, 468 A.2d 150, 164 (citations omitted). New Jersey courts have also pierced the corporate veil of a closely held corporation to impose liability on the owner individually. *Kugler v. Koscot Interplanetary, Inc.*, 120 N.J. Super. 216, 293 A.2d 682 (Ch. Div. 1972) (personal liability imposed in the wake of a fraudulent pyramid scheme). New Jersey courts will likewise pierce the corporate veil of a subsidiary [or affiliate] corporation where it is a mere instrumentality of the parent corporation. *Mueller v. Seabord Commercial Corp.*, 5 N.J. 28, 73 A.2d 905 (1950).

After the four day evidentiary hearing, Judge Minuskin stated,

> I think Dr. Elamir in his operations . . . was perpetrating a fraud upon the plaintiff and now [,] when it comes to collecting [,] a fraud on the court[;] and I believe that [the] protection . . . he seeks to have and believes . . . he did have by virtue of being [incorporated] . . . *is one that should be pierced.*

(Pet. App. at 7a) (emphasis added). In his letter opinion dated July 27, 1999, Judge Minuskin stated, "It clearly and convincingly appears that the corporations were used simply as *alter egos* of Dr. Elamir for the purpose of obtaining income for his own benefit and defeating the claims of creditors." (Pet. App. at 20a.) Accordingly, the judgment was reentered, now against Elamir, Irvington, Paterson, Kennedy and Jersey City, as well as Summit. (Pet. App. at 15a-16a.) By adding Petitioners as parties to the judgment against penniless Summit MRI, Respondent Magnet simply was looking to pierce the corporate veil and establish alter ego liability. This is different from what occurred in *Nelson*.[2]

Petitioners received due process. The imposition of liability on the petitioners herein was not instantaneous.

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2. In a recent decision in the District of Connecticut, the Bankruptcy court stated the following about *Nelson*: In *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 471 (2000), the Supreme Court found that District Court's instantaneous imposition of personal liability on Nelson (without relying on any theory of corporate veil piercing) did not provide him an opportunity to respond and contest his personal liability. *In Re Altman*, 254 B.R. 509, 516 (D.Conn. 2000).

Furthermore, Respondent relied on corporate veil piercing and alter ego theories of liability throughout the post-trial proceedings. As such, *Nelson* does not apply.

D. Nelson Was Brought Under Rule 15 of the Federal Rules of Civil Procedure, Petitioners Make No Such Claim

Another distinction between this case and *Nelson* is that the latter was brought under Rule 15 of the Federal Rules of Civil Procedure. In this case, The Rules Governing the Courts of the State of New Jersey apply. Petitioners argue that this case is analogous to *Nelson*, but they are in error. Petitioners do not claim that Rule 15 has been violated, because they simply cannot. This action was not brought in Federal Court, and as such Rule 15 does not apply. Instead, Petitioners make a broad procedural due process argument and cite *Nelson* as relevant authority.

Respondent moved under Rule 4:50-1 of the New Jersey Rules of Court to seek relief from its judgment. Rule 4:50-1 provides in relevant part:

> On motion, with briefs, and upon such terms as are just, the court may relieve a party . . . from final judgment or order for the following reasons: (a) mistake, inadvertence, surprise or excusable neglect; (b) newly discovered evidence which would probably alter the judgment or order and by which due diligence could not have been discovered in time to move for a new trail under R. 4:49; (c) fraud (whether heretofore denominated intrinsic or extrinsic), mis-representation, or other misconduct of an adverse

> party; . . . (f) any other reason justifying relief from the operation of the judgment or order.

Furthermore, R. 4:50-2 provides for the time in which such a motion can be made. The rule states that "[A] motion shall be made within a reasonable time, and for reasons (a), (b) and (c) of R.4:50-1 not more than one year after the judgment . . . was entered." Respondents complied with this Rule. (*See infra*, Resp. Brief n.1). Moreover, Petitioners do not attack Rule 4:50-1, nor do they claim that the New Jersey Courts failed to follow it. Rule 4:50-1 requires due process, and Judge Minuskin did just that. He provided due process "upon such terms which are just."

In *Nelson*, the Supreme Court held that an amendment of judgment, which resulted in the imposition of liability for attorney fees against the sole shareholder of a plaintiff corporation, simultaneously with the amendment of the defendant's pleadings to add the shareholder as a party, violated Rule 15 and due process. *Nelson v. Adams USA, Inc.*, 529 U.S. 460 (2000). Due process required that the shareholder be given an opportunity to be heard before the entry of judgment against him. The shareholder was never provided a proper opportunity to respond to the claim against him, but was adjudged liable the very first moment his personal liability was legally at issue. *Id.* The requirements of Rule 15 were not met in *Nelson*, and due process does not countenance such swift passage from pleading to judgment in the pleader's favor.

Since procedural due process is not a fixed concept, the procedures followed may vary. *Doe v. Poritz*, 142 N.J. 1, 106, 662 A.2d 367 (1995). Instead, Respondent filed a proper and timely motion under R. 4:50-1. Furthermore, under the

principles elicited in *Shammas v. Shammas*, 9 N.J. 321, 330 (1952), the final judgment could be opened. Appropriately, proceedings, which Dr. Elamir was clearly aware of and fully participated in, were held to pierce the corporate veil of Elamir and his various entities. Accordingly, Petitioners received the procedural due process afforded to them by the Fourteenth Amendment, and as such, Petitioners Writ should be denied.

II.

UNDER NEW JERSEY LAW, A JUDGMENT CAN BE OPENED WHERE A PARTY COMMITS FRAUD ON THE COURT

Under New Jersey law, a court is permitted to open a judgment where there is clear and convincing evidence that there was 1) false testimony; 2) it was material and probably controlled the result; and 3) it could not have been discovered by reasonable diligence *or* that for other good cause the failure to use due diligence . . . is not a bar to relief. *Shammas v. Shammas*, 9 N.J. 321, 330 (1952).

The facts of this case demonstrate that this standard has been easily satisfied. First, Summit filed a counterclaim in April 1995 alleging "lost profits" for Summit in December 1994 for Magnet's alleged breach of the service contract covering both the Irvington site and the Paterson site. (Deposition of Magdy Elamir, February, 25, 1998 at 150-151 ("Dep. Elamir 2/25/98")). Elamir swore in a certification that the allegations in Summit's counterclaim were true. (Certification of Magdy Elamir, M.D., February 16, 1996). It is not disputed that Summit was defunct at the time, and that Elamir, as president and sole

shareholder of Summit knew it. (Deposition of Magdy Elamir, November, 4 1997 at 18 ("Dep. Elamir 11/4/97"); Dep. Elamir 2/25/98 at 151).

Second, the counterclaim was couched as "Summit MRI, Inc. now known as Irvington MRI, Inc." (Pet. Brief at 5). Elamir was asked about this during post-trial depositions, and he swore that the name change was not a change in corporate status or ownership, but instead a "simple change on the name of the building." (Transcript of Motion before Judge Minuskin, J.S.C., January 26, 1998 at 23-25 ("Motion 2/26/98"); (Dep. Elamir 11/4/97 at 18, 31-34). It is now undisputed that this testimony was false.

Third, Dr. Elamir testified that most of Summit's assets had been transferred to a corporate entity called Irvington MRI, P.A., an entity whose independent corporate existence was not disclosed until the supplementary proceedings were held. (Dep. Elamir 2/25/98 at 116, 125, 126, 139)[3]. Moreover, it is not surprising that there is not a single record to memorialize this "corporate" transfer.

Fourth, Summit MRI's counsel filed a summary judgment brief in or about February 1996, stating that Summit was in business in 1994. (Pet. App. at 35a). It is now undisputed that this statement of facts was false.

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3. Petitioners now concede that Irvington MRI, P.A. may be held liable for the judgment. (Pet. Br. at 13) This is hardly a magnanimous gesture as Irvington MRI, P.A. does not even maintain a bank account. Thus, by siphoning off all of its assets to the other Petitioners, in all likelihood, Irvington MRI, P.A. like Summit, is judgment proof. (Dep. Elamir 11/5/97 at 63-69). The Court should ignore this covert signal of Petitioners' willingness to accept a split baby.

Fifth, Summit's July 1996 amended answers to interrogatories claimed that Summit's damages in December 1994 were $28,968 (Amended Attachment to Interrogatories by Magdy Elamir, M.D., President of Summit MRI, Inc., June 1996), and furthermore this was testified to under oath by Summit's Mohammed Hanafy at trial. (Pet. App. at 41a) It is now undisputed that this statement was false. Oddly enough, Summit's tax return for 1994, prepared by Mr. Hanafy, stated that Summit had no income or accounts receivable for that entire year. (Deposition of Mohammed Hanafy, November 5, 1997 at 40; New Jersey Corporation Business Tax Return for Taxable Years Ending July 31, 1994 Through June 30, 1995).

Sixth, at all times, Summit pressed its claim against Magnet, and defended Magnet's claim against it, knowing but not disclosing that all of its assets had been transferred. (Transcript of Proceedings Before Judge Minuskin, J.S.C., May 6, 1999 at 15). At the same time, Jersey City Neurological Center, Inc. (a petitioner herein) paid Summit's legal expenses to keep this charade a concealed. (Dep. Elamir 2/25/98 at 125; Invoices for Professional Services rendered by Gallo & Gallo, Attorneys at Law; Jersey City Neurological Center, Inc. copies of checks in the amount of $1,500 to Gallo and Gallo).[4]

Seventh, the petitioner corporations have completely disregarded the corporate form. For example, even though Elamir testified that most of Summit's assets were transferred to Irvington MRI, P.A. and most of Summit's employees began working for Irvington MRI, P.A., (Deposition of Magdy Elamir, M.D., February 5, 1998 at 68-69 ("Dep. Elamir 2/5/98"); Dep. Elamir

4. Neither Dr. Elamir nor Summit ever gave notice to its creditors that its assets had been transferred.

2/25/98 at 116, 120), Elamir conceded Irvington MRI does not maintain a bank account. (Dep. Elamir 2/5/98 at 33, 47). All of Irvington MRI's revenue goes to Kennedy. (Dep. Elamir 2/5/98 at 47). Irvington MRI's payroll, however, is paid for by Jersey City Neurological Center. (Dep. Elamir 2/5/98 at 51-52). Irvington MRI and Paterson MRI lease their respective premises from Dr. Elamir, (Deposition of Mohammed Hanafy, February 23, 1998 at 91-92 ("Dep. Hanafy 2/23/98")), yet there are no lease documents. (Dep. Hanafy 2/23/98 at 91-92). In addition neither Elamir nor Hanafy, the *only* two people with knowledge of the leases, can describe any particulars regarding the leases, including the monthly amount due or the duration of the lease. (Dep. Hanafy 2/23/98 at 91-92).

Furthermore, the bank accounts of all the petitioners are interchangeable. Both Elamir and Hanafy testified during supplemental proceedings and at the four day evidentiary hearing that money in the bank account of one of the petitioners' would be used to pay the debts of another. (Dep. Elamir 2/5/98 at 42, 46-49, 55; Dep. Hanafy 2/23/98 at 81-91; Evidentiary Hearing Testimony of Magdy Elamir, M.D., before Judge Minuskin, J.S.C., June 16, 1998 at 80-81, 85, 96-100). The obligations of one, were the obligations of all; the liability of one established the liability of all.

These facts support the decisions of the lower courts. They plainly establish that a fraud was committed both on the Court and on Magnet, and that this fraud controlled the result.[5] Accordingly, under New Jersey law and the principles elicited in *Shammas*, this judgment can be opened.

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5. Judge Minuskin found that Scott Sheldon, Esq. of Carpenter, Bennett & Morrissey, the original attorney for Magnet Resources, and the attorney who tried the case for Magnet, acted with due diligence throughout the proceedings. (Resp. App. at 6a).

III.

PETITIONERS RECEIVED DUE PROCESS UNDER BOTH FEDERAL AND NEW JERSEY LAW

Procedural due process requires notice and an opportunity to be heard. *Mettinger v. Globe Slicing Machine Co, Inc.*, 153 N.J. 371, 389, 709 A.2d 779, 788 (1998); *see also Doe v. Poritz*, 142 N.J. 1, 106, 662 A.2d 367, 420 (1995). "Due process is not a fixed concept . . . but a flexible one that depends on the particular circumstances." *Doe v. Poritz*, 142 N.J. at 106, 662 A.2d 367, 420. "Fundamentally, due process requires an opportunity to be heard at a meaningful time and in a meaningful manner." *Id.* "The minimum requirements of due process, therefore, are notice and the opportunity to be heard." *Id.*, *see also United States v. Raffoul*, 826 F.2d 218, 222 (3d Cir. 1987) (citing *Goss v. Lopez*, 419 U.S. 565, 95 S. Ct. 729 (1975)).

Petitioners were given notice of respondent's claims time and time again. Petitioners also had an opportunity to be heard, and fully participated in the four day evidentiary hearing. Due process calls for no more.

CONCLUSION

For all the forgoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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APPENDIX

A-1 — LETTER DATED MAY 13, 1999 FROM HON. ARTHUR MINUSKIN OF THE SUPERIOR COURT OF NEW JERSEY, ESSEX VICINAGE SCHEDULING EVIDENTIARY HEARING

SUPERIOR COURT OF NEW JERSEY
ESSEX VICINAGE

Chambers of
Arthur Minuskin
Judge T/A

Essex County Courts Building
Newark, New Jersey 07102

May 13, 1999

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Re: Magnet Resources Inc. V. Elamir, et al.
Docket ESX-L-2156-95

A-1

Gentlemen:

The Court has considered the argument of counsel and the motion to amend the judgment to include various other defendants and has reviewed the documents submitted. The Court has determined that it will conduct a hearing on Wednesday, June 16th at 9:00 am and requests all parties to be present with any witnesses they wish to call upon to establish the facts and circumstances which may or may not justify the Court in amending the judgment to include various other defendants and/or granting equitable relief in accordance with plaintiff's request.

Sincerely,

s/ Arthur Minuskin
ARTHUR MINUSKIN

A-2 — EXCERPTS OF TRANSCRIPT DATED JUNE 28, 1999

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION : ESSEX COUNTY
DOCKET NO. ESX-L-2156-95

MAGNET RESOURCES, INC.

Plaintiff,

-vs-

ELAMIR, et al.

Defendants.

Place: 50 W. Market Street
Newark, NJ 07102

Date: June 28, 1999

BEFORE:

THE HONORABLE ARTHUR J. MINUSKIN, J.S.C.

* * *

[42]

* * *

THE COURT: . . .

I appreciate the arguments that have been presented at this time, as well as the memorandums that you have submitted in support of your arguments.

A-2

I have the distinct advantage of not — perhaps even greater than your particular position as counsel for these parties to have been the Judge who presided at the trial and has a little bit more familiarity with the testimony and the ability to be able to evaluate the testimony and the witnesses and give whatever credibility the Court desires to give to them based upon their candor, the Court's evaluation of their ability to tell the truth and I emphasize that because that's a basis upon which the court is relying in connection with making its findings, at this hearing.

I do find — I do find in the Court's opinion that there has been a fraud committed upon the Court and I do understand that it has to be by clear and convincing evidence, and the Court is satisfied that there is clear and convincing evidence that this is so.

There were several parties who were made defendants in this case at the initial trial and motion was made to release them and they were released because it was determined at that time that they had no connection with the case, there was no viable cause of action and I do believe that the Plaintiff's attorney exercised due diligence in the manner in which he proceeded in this particular case.

He had before him many of these corporations and he had the urgency of his client to sue them all, which I think he very appropriately disregarded.

And he relied on what he would discover at the time of depositions and in Answers to Interrogatories and in the pleadings that were filed in this case.

A-2

And there's no question, not question in the Court's mind that the Defendant, Summit, Inc. — Summit MRI, Inc. filed a counterclaim asserting that there were damages, there was loss of profits, loss of profits for their operations at Paterson and at Irvington and those loss of profits amounted to $28,968 for five and a half days of operation at those two facilities.

Now, it doesn't take any simpleton to transpose those figures as to what the profits would have been for a year, even if we assume like we do how many days a Judge may be sitting in a particular year and if you in fact use 200 days as a number of days, there's no question in the Court's mind, and perhaps in Counsel's mind too, that there were profits that were emanating from this MRI of over one million dollars and he had no need in the interest of operating his business to see to it that there was security interest or other kinds of things that he should have provided for in dealing with these Defendants.

But the Court finds as a fact that Summit MRI alleges in its counterclaim that it lost profits and in December, the last half of December, 1994, when it appears that after seeking to enforce its judgment it was discovered that it was not operating for a half a year, that it had changed its operations over to a new name called Irvington and there was support for the fact that was a simple change of name.

Sure, there's confusing testimony about what Dr. Elamir stated at that deposition hearing, but the Court does believe, and having viewed the testimony of Dr. Elamir in the past, believes that that confusion was deliberate and intentional and that was all part of this fraud, to see to it that

whatever judgment might be asserted against Summit MRI were they not successful would not in any way collectable.

The Court feels that there is greater support for that conclusion based upon the testimony that apparently came forth at the time the original trial as well as at this hearing, that Dr. Elamir apparently with Dr. — with Hanafy, operating all those corporations in such a manner that whatever indebtedness had occurred, it would paid out of a corporation that had money to pay the same. That's the testimony of this hearing.

And not even with the direction of Hanafy as to which corporation it was appropriate then to make payment for the same, but simply on the basis of a clerk's decision as to which, in the clerk's opinion, had money in order to satisfy the indebtedness that was claimed and due to the Plaintiff.

I don't feel that Mr. Sheldon didn't exercise due diligence. As a matter of fact, I find that he did.

And relying on the sentence in Shamus versus Shamus, on page 330, even absent use of due diligence, although for other good reason the failure to use due diligence is not a bar to relief.

And I think there is further good reason why due diligence in this particular case is not a bar to relief.

I think Dr. Elamir in his operations of this facility or these two facilities was perpetrating a fraud upon the Plaintiff and now when it comes to collecting a fraud upon the Court

and I believe that his protection that he seeks to have and believes that he did have by virtue of being appropriated, I think is one that should be pierced.

I don't feel that he's been using these corporations for the purpose of — for his own personal use and for that reason I think that there's been established fraud or injustice which would permit the Court to conclude that the corporate veil in this particular instance of all of his corporations should be pierced.

And for those reasons I find that there is relief that should be granted the — exercising his equity jurisdiction, should amend the judgment so as to include all of these defendants as defendants in the suit.

Now, what was the dispute? What was the issue in dispute? The issue in dispute here was the question of whether there was monies that were due to the Plaintiff.

There's no problem here of a trial or an issue which any of these Defendants would have any interest in.

That issue was tried.

The only question was the third element of that which gives a cause of action, namely has there been liability, namely has there been damages and, thirdly, is there a party against whom it's collectable.

And in that respect these Defendants are added in the Court's judgment as party defendants, where they may —

this judgment may be pursued for satisfaction because of the fraud and because of the fact that it's the Court's opinion that a million dollars that came in during the year of 1994 went to one of these corporations and the Plaintiff should not be deprived of its ability to be able to collect the same.

So for those reasons, I'll amend the judgment to include these parties: Dr. Elamir individually and Mr. Hanafy individually as part of a scheme.

He came in here and he testified as to what these damages were to Summit Corporation when in fact it was his knowledge, and the Court believes it was his knowledge, that at that particular time he testified that there was no damages to this Summit Corporation, Summit MRI, Incorporated.

And I think he is part of this fraud that was perpetrated on the Plaintiff, and I so rule.

* * *